



9110-06

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS-2012-0035]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security; U.S. Customs and Border Protection; DHS/CBP-004-Intellectual Property Rights e-Recordation and Search Systems, System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is giving concurrent notice of a newly established system of records pursuant to the Privacy Act of 1974 for the “Department of Homeland Security/ U.S. Customs and Border Protection; DHS/CBP-004-Intellectual Property Rights e-Recordation and Search Systems (IPRRSS), System of Records” and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number DHS-2012-0035, by one of the following methods:

- Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Fax: 202-343-4010.
- Mail: Jonathan R. Cantor, Acting Chief Privacy Officer, Privacy Office,
Department of Homeland Security, Washington, D.C. 20528.

INSTRUCTIONS: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

DOCKET: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Laurence E. Castelli (202-325-0280), CBP Privacy Officer, Office of International Trade/Regulations and Rulings, U.S. Customs and Border Protection, Mint Annex, 799 9th Street, NW, Washington, D.C. 20229-1177. For privacy issues please contact: Jonathan R. Cantor (202-343-1717), Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, D.C. 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. § 552a, the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) proposes to establish a new DHS system of records titled, “DHS/CBP-004-Intellectual Property Rights e-Recordation and Search Systems System of Records.”

The Intellectual Property Rights e-Recordation and Search Systems (IPRRSS) collect, use, and maintain records related to intellectual property rights recordations and their owners. The purpose of IPRRSS is to aid in the enforcement of intellectual property

rights by making intellectual property recordings available to the public and to CBP officials.

IPRRSS collectively encompasses three separate systems. The first system is the online Intellectual Property Rights e-Recordation (IPRR) system, which allows intellectual property owners to submit applications for trademark and copyright recordings. The IPRR system shares information with the public Intellectual Property Rights Search (IPRS) system and the CBP Intellectual Property Rights Internal Search (IPRiS) system. Because CBP may collect personally identifiable information (PII) about intellectual property rights holders, their agents, or their licensees in IPRR, IPRS, and IPRiS (collectively IPRRSS), CBP is providing the public notice about how CBP collects, uses, and maintains records related to intellectual property rights recordings.

The authority for this system derives from Section 42 of the Lanham Act (Trademark Act of 1946), as amended, 15 U.S.C. § 1124; Sections 101 and 602 through 603 of the Copyright Act of 1976, as amended, 17 U.S.C. §§ 101, 602-603; and Sections 526, 595a, and 624 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1526, 1595a, and 1624. The cited sections provide that intellectual property rights owners may submit information to CBP to enable CBP officials to identify infringing articles at the borders and prevent the importation of counterfeit or pirated merchandise. Owners seeking to have merchandise excluded from entry must provide proof to CBP of the validity of the intellectual property rights they seek to protect.

Pursuant to the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 9701, and regulations at 19 C.F.R. §§ 133.3, 133.13, and 133.33, intellectual property rights owners or their agents must pay a fee when they apply for the recordation with

CBP of their trademark, trade name, or copyright. Through IPRR's web-based interface, the user will be prompted through several steps that capture the user's required application information. Once the applicant has entered all required application information, IPRR will guide the applicant through a series of prompts seeking his/her billing name, billing address, and credit card information. IPRR forwards this payment information to Pay.gov for payment processing, and the applicant name and an IPRR tracking number to the DHS/CBP-003 Credit/Debit Card Data System (CDCDS) System of Records for payment reconciliation. Pay.gov sends a nightly activity file, including the last four digits of the credit card, authorization number, billing name, billing address, IPRR tracking number, and Pay.gov tracking numbers to CDCDS. Pay.gov also sends a daily batch file with the necessary payment information to a commercial bank for settlement processing. After processing, the commercial bank sends a settlement file, including the full credit card number, authorization number, card type, transaction date, amount, and IPRR tracking number to CDCDS. Once IPRR receives confirmation from Pay.gov that the payment has been processed successfully, IPRR will retain the Pay.gov tracking number for payment reconciliation purposes in accordance with the CDCDS system of records retention schedule.

When an applicant enters the registration number of a copyright or trademark he or she would like to record with CBP, the IPRR system must receive a positive match response from the U.S. Patent and Trademark Office (USPTO) and U.S. Copyright Office websites in order for the application to proceed. Only the registration number is shared with the USPTO and U.S. Copyright Office websites. If the registration number entered in IPRR does not match an entry in either of these websites, the applicant cannot record

their trademark or copyright with CBP. Once a positive match response is received from these systems, certain fields in the application are automatically populated with public data taken directly from the U.S. Copyright Office or USPTO websites. All of the information copied from the U.S. Copyright Office or USPTO websites is publicly available at www.uspto.gov and www.copyright.gov.

The public may search for trademark, trade name, and copyright information in IPRS, the public facing portion of this system of records. The IPRS database collects and retains only a portion of the information entered by the right holder in IPRR, such as the name, address, and phone number of the right holder or representative, along with a text description of the recorded trademark or copyright. This information allows retailers, consumers, and other businesses to contact the right owner to ensure that they are not obtaining goods that infringe on the owner's intellectual property rights.

CBP and U.S. Immigration and Customs Enforcement (ICE) officials have access to IPRiS to assist in the enforcement of intellectual property rights. IPRiS provides a central searchable database of all trademark, trade name, and copyright recordation information. IPRiS contains the same information as IPRS, but with additional fields containing confidential information submitted by the right holder, including the names of entities who have used the trademark or copyright, the country of manufacture of merchandise, images of the recorded trademark or copyright, lists of licensees, and any additional information relating to enforcement of the intellectual property right. Only CBP and ICE officials may search IPRiS.

Only a few users within CBP have access to an administrative interface to process IPRR recordations. Those authorized CBP users with administrative access process the

renewals of existing trademark and copyright recordations, trade name recordations, and information about ownership changes or cancellations.

Consistent with DHS' information-sharing mission, information stored in the DHS/CBP-004-Intellectual Property Rights e-Recordation and Intellectual Property Rights Search Systems may be shared with other DHS components with a need to know the information. In addition, these records may be shared with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies so long as the recipient has a need to know the information to carry out functions consistent with the routine uses set forth in the system of records notice (SORN).

The Department of Homeland Security is issuing this Notice of Proposed rulemaking to exempt this system of records from certain provisions of the Privacy Act, concurrent with the system of records notice. DHS is not exempting any data in the system regarding an individual's application for recordation of his or her trademark, trade name, or copyright. This system, however, may contain records or information pertaining to the accounting of disclosures of records pertaining to persons or entities, who are alleged to have made an infringing use of a recorded intellectual property right, made from this system to other national security, law enforcement, or intelligence agencies (federal, state, local, foreign, international or tribal) in accordance with the published routine uses or statutory basis for disclosure under 5 U.S.C. § 552a(b). For the accounting of these disclosures only, in accordance with 5 U.S.C. § 552a (j)(2) and (k)(2), DHS will claim exemptions for these records or information.

II. Privacy Act:

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the federal government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a “system of records.” A “system of records” is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all persons, regardless of citizenship, where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/CBP-004-Intellectual Property Rights e-Recordation and Intellectual Property Rights Search Systems System of Records. Some information in DHS/CBP-004-Intellectual Property Rights e-Recordation and Intellectual Property Rights Search Systems System of Records relates to official DHS national security, law enforcement or intelligence activities, and that information includes records or information pertaining to the accounting of disclosures made from this system to other law enforcement or intelligence agencies (federal, state, local, foreign, international, or tribal) in accordance

with the published routine uses or statutory basis for disclosure pursuant to 5 U.S.C. § 552a(b). In addition, some information in DHS/CBP-004-Intellectual Property Rights e-Recordation and Intellectual Property Rights Search Systems System of Records relates to information or records about individuals who may have used an intellectual property right without the intellectual property right owner's authorization. These exemptions are needed to protect information relating to DHS national security, law enforcement, or intelligence activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes and to avoid disclosure of activity techniques. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard intelligence, law enforcement, and national security exemptions exercised by a large number of federal law enforcement and intelligence agencies. In appropriate circumstances, when compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/CBP-004-Intellectual Property Rights e-Recordation and Search Systems System of Records is also published in this issue of the Federal Register.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5--DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

Authority: Pub. L. 107-296, 116 Stat. 2135; (6 U.S.C. 101 et seq.); 5 U.S.C. 301.

Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, the following new paragraph “69”:

Appendix C to Part 5 – DHS Systems of Records Exempt From the Privacy Act

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69. The DHS/CBP-004 Intellectual Property Rights e-Recordation and Search Systems System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/CBP-004-Intellectual Property Rights e-Recordation and Search Systems System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to, the enforcement of civil and criminal laws; investigations, inquiries, and proceedings; national security; and intelligence activities. The DHS/CBP-004-Intellectual Property Rights e-Recordation and Search Systems System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, territorial, foreign, or international government agencies. CBP will not assert any exemptions with respect to information in the systems submitted by the intellectual property right owner or the owner’s representative. Information in the system pertaining to persons alleged to have infringed on an intellectual property right may be

shared with national security, law enforcement, or intelligence agencies pursuant to the published routine uses. The Privacy Act requires DHS to maintain an accounting of the disclosures made pursuant to all routines uses. Disclosing the fact that national security, law enforcement or intelligence agencies have sought particular records may affect ongoing national security, law enforcement, or intelligence activity. As such, pursuant to 5 U.S.C. § 552a(j)(2), DHS will claim exemption from subsections (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as necessary and appropriate to protect this information. In addition, because the system may contain information or records about the unauthorized use of intellectual property rights and disclosure of that information could impede law enforcement investigations, DHS will claim, pursuant to 5 U.S.C. § 552a(k)(2), exemption from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act of 1974, as necessary and appropriate to protect this information.

Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

- (a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or

evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and

therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(e) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(f) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Jonathan R. Cantor

Acting Chief Privacy Officer,

Department of Homeland Security.

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